

A Child Shall Lead Them: Developing and Utilizing Child Protection Mediation to Better Serve the Interests of the Child

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I. INTRODUCTION

In a rural town in Ohio, a child services investigator found eleven adopted and foster children, ages one to fourteen, sleeping in cages made of wood and wire.¹ The cages, thirty inches high, forty inches wide, and forty inches deep, were rigged with alarms in case a child tried to escape.² All of the children have serious emotional disorders as a result of their biological parents' drug addictions and violence,³ as well as physical ailments such as HIV, pica,⁴ and fetal alcohol syndrome. The children's adoptive foster parents insisted that a psychiatrist recommended the cages to protect the children from themselves.⁵

Unfortunately, stories like this one are not rare; child abuse and neglect are significant problems in the United States.⁶ Historically, the litigation

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¹ *Nancy Grace* (CNN television broadcast Sept. 14, 2005) (transcript available at <http://edition.cnn.com/TRANSCRIPTS/0509/14/ng.01.html>).

² M.R. Kropko, *Children Made to Sleep in Cages in Ohio*, ABC NEWS, Sept. 13, 2005, <http://www.wjla.com/headlines/0905/259822.html>.

³ *Nancy Grace*, *supra* note 1.

⁴ Pica is an eating disorder in which a child compulsively eats items such as dirt and rocks. 13ABC.COM, *Caged Children Pictures Released*, <http://abclocal.go.com/wtv/story?section=local&id=3521205>.

⁵ Kropko, *supra* note 2.

⁶ *Infra* notes 11–12. Child abuse and neglect are defined by state statute. Some states provide general statutes, for example, OHIO REV. CODE ANN. § 2151.03.1 (West 2005) defines an “abused child” to include any child who:

Exhibits evidence of any physical or mental injury or death, inflicted other than by accidental means, or an injury or death which is at variance with the history given of it . . . Because of the acts of his parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare.

OHIO REV. CODE ANN. § 2151.03 (West 2005) defines a “neglected child” to include any child:

process has served as the funnel for child protection cases.⁷ The mediation process, however, can overcome obstacles that arise during litigation, and actually result in empowerment for both children and families.⁸ Part II of this Note will first discuss the state of child abuse and neglect incidence in the United States. Next, Part III will outline two legal systems dealing with child abuse and neglect—child protection litigation and mediation—and the benefits and problems associated with each system. Part IV provides suggestions for further developments in child mediation, including involvement of the child, mediator training and certification, and confidentiality requirements.

Who is abandoned by the child's parents, guardian, or custodian; Who lacks adequate parental care because of the faults or habits of the child's parents, guardian, or custodian; Whose parents, guardians, or custodian neglects the child or refuses to provide proper or necessary subsistence, education, medical or surgical care or treatment, or other care necessary for the child's health, morals, or well being; Whose parents, guardian, or custodian neglects the child or refuses to provide the special care made necessary by the child's mental condition . . . Who, because of the omission of the child's parents, guardian, or custodian, suffers physical or mental injury that harms or threatens to harm the child's health or welfare . . .

Other states, such as Florida, have more precise definitions which specifically state that abuse may be the result of both "acts or omissions," and "neglect" may result when "the parent or other person responsible for the child's welfare fails to supply the child with adequate food, clothing, shelter, or health care, although financially able to do so" FLA. STAT. § 39.01 (2005).

⁷ Since the 1600s the criminal law has prosecuted parents who abuse and neglect their children. In 1874 the civil child protection system emerged. In 1899, the juvenile court system began with child protection cases as a major part of the caseload. DOUGLAS E. ABRAMS & SARAH H. RAMSEY, *CHILDREN AND THE LAW*, 286–87 (2d ed. 2003).

⁸ See generally Leonard P. Edwards, *Trends and Development in Child Protection Cases: Mediation in Child Protection Cases*, 5 J. CENTER FOR FAM., CHILD. & CTS. 57, 62–65 (2004) (discussing child protection mediation and the impact of the process on the parties involved); Gregory Firestone & Janet Weinstein, *In the Best Interest of the Children: A Proposal to Transform the Adversarial System*, 42 FAM. CT. REV. 203, 203–207 (2004) (discussing problems created by litigating child protection cases).

II. THE CURRENT STATE OF CHILD ABUSE AND NEGLECT INCIDENCE IN THE UNITED STATES

A. *Prevalence of Child Abuse and Neglect*

Statistics compiled through the National Incidence Study of Child Abuse⁹ and by the U.S. Department of Health and Human Services show that child abuse is a significant problem in the United States.¹⁰ Between the years of 1986 and 1993, physical abuse of children in the United States nearly doubled, with the number of affected children increasing from 311,500 to 614,100.¹¹ Under the “harm standard,”¹² where behavior is considered abusive only if it results in demonstrable harm or injury, the number of physically abused children in this country has increased by 42% between the years of 1986 and 1993.¹³ These statistics correspond with an annual abuse and neglect national incidence rate of five out of every thousand children.¹⁴ In 2004, an estimated 807,000 children were victims of child abuse or

⁹ Incident and prevalence data is based on the Third National Incidence Study of Child Abuse, NIS-3. NIS-3 is sponsored by the Administration for Children and Families, U.S. Department of Health and Human Services. NIS-3 is the most recent study in a congressionally mandated periodic research effort on the occurrence of child abuse in the United States. For information on the Fourth National Incidence Study of Child Abuse which is currently underway, see www.nis4.org/nishome.asp (last visited January 3, 2006).

¹⁰ 1 B.D. PERRY, ET AL. *Child Physical Abuse*, in *ENCYCLOPEDIA OF CRIME AND PUNISHMENT* 197 (2002).

¹¹ *Id.*

¹² *Id.* While it is difficult to establish a precise definition of child abuse, there are two generally accepted definitional standards used in the United States legal system. The first of these is the “harm standard” as described above. Demonstrable harm required by the harm standard may include bruises, abrasions, cuts, burns, or bites. The second is the “endangerment standard.” According to this standard, physical assault by a parent or caregiver that creates a substantial risk of physical injury is regarded as abuse. Hitting a child, choking, shaking, burning, and other similar behaviors would be considered abusive under the endangerment standard. In comparison, under the harm standard, injury to the child is the focus of the definition, while perpetrator behavior is central to the endangerment standard. *Id.*

¹³ *Id.* Studies suggest that the increase in the incidence rate may be a reflection of both an increase in the rate of abuse as well as increased knowledge and awareness of professionals in regard to the signs and indications of abuse, thereby increasing the likelihood that abuse will be identified and reported. *Id.*

¹⁴ *Id.*

neglect in the United States.¹⁵ Sixty percent of these children were neglected and 18% were physically abused.¹⁶ In the course of thirteen years, the rate of victimization per one thousand children in the United States has only dropped slightly from 13.4 children in 1990 to 11.9 children in 2004.¹⁷ The 2004 study found that parents constituted 79% of the perpetrators of child abuse.¹⁸

B. The Impact of Child Abuse and Neglect on Society

The most troubling result of child abuse is the loss of young lives.¹⁹ Conservative estimates indicate that about two thousand infants and young children die from abuse or neglect each year in the United States—more than five children per day.²⁰ According to research at the Center for Disease Control and Prevention, 5.4 out of every 100,000 children ages four and under die as a result of abuse or neglect.²¹

While the loss of lives is the most traumatic result of child abuse and neglect, this problem has further implications for society. A 1992 study that followed the developmental history of 1,575 children through early

¹⁵ NATIONAL CLEARINGHOUSE ON CHILD ABUSE AND NEGLECT INFORMATION, CHILD MALTREATMENT 2004: SUMMARY OF KEY FINDINGS (2006), available at <http://childwelfare.gov/pubs/factsheets/canstats.pdf>

¹⁶ *Id.* In addition to neglect and physical abuse, 10% were sexually abused, 7% were emotionally maltreated, and 15% were associated with “other” types of maltreatment based on specific state laws and policies. *Id.*

¹⁷ *Id.*

¹⁸ *Id.* Other relatives (7%), unmarried partners of parents (4%), and persons with other relationships to child victims, such as teachers, camp counselors, or unknown relationships (combined 10%), accounted for the other 20% of perpetrators. *Id.*

¹⁹ See ELIZABETH RUSSELL CONNELLY, CHILD ABUSE AND NEGLECT: EXAMINING THE PSYCHOLOGICAL COMPONENTS 66 (Stephen Reginald ed., Chelsea House Publisher 2000) (discussing child deaths from abuse).

²⁰ *Id.* A majority of these deaths occur under the age of four, when children are most vulnerable to physical abuse and dangers that results from neglect and lack of supervision, and when they are not in the presence of teachers or others who may intervene on their behalf. *Id.*

²¹ *Id.* Since childhood deaths are frequently misclassified, a more realistic estimate may potentially be twice as high. A 1993 study by the National Research Council (NRC) of the National Academy of Sciences suggests 84% of child abuse and neglect deaths have been “systematically misidentified.” Of the cases involved in the NRC’s extensive child abuse and neglect study: 38% were listed as accidents, 15% as homicides with no indication that a parent or caretaker was the perpetrator, 15% as sudden infant death syndrome, 9% as natural, and 7% as “undetermined intentionality.” *Id.* at 66–67.

adulthood revealed that those who had been abused or neglected as children were more likely to be arrested for violent crimes during adolescence and adulthood.²²

Besides damaging, and in some cases ending, young lives and increasing rates of violence, child abuse is also increasingly costing more money to treat and rehabilitate.²³ For example, the annual cost of responding to child sexual abuse in the state of Vermont alone in 1993 was estimated at \$42 million.²⁴ In addition to the cost of rehabilitation, the future lost productivity of the nation's severely abused children in the long run is \$658 million to \$1.3 billion, if the children's impairments limit their potential earning capacity by only 5% to 10%.²⁵

With the detrimental effects on children ranging from injury to permanent impairment to death, and the societal effects of lost lives, treatment and rehabilitative costs, and lost productivity, child abuse and neglect are growing concerns which cannot be ignored. The legal system must provide a forum in which children will be protected, their "best interests"²⁶ will be met, and if at all possible, the family unit will remain intact.

²² *Id.* at 65. While males showed higher rates of criminal behavior, females who were abused or neglected in childhood were 77% more likely to be arrested than females who were not. *Id.*

²³ *Id.* at 66.

²⁴ *Id.* Another study of forty-nine state and federal penal systems over a ten year period found that in 1990 alone, 85,647 sex offenders were incarcerated. In 1990, the national average annual cost of housing one prison inmate was \$24,000, resulting in a cost of \$2.05 billion to incarcerate adult sex offenders in America. This calculation includes only housing cost, not costs incurred in prosecuting and developing a case against the offender. *Id.*

²⁵ *Id.* at 69 (data is based on a 1993 National Research Council study).

²⁶ This term, "the best interest of the child," is a vague standard. Some states provide a list of factors to be considered in determining the best interest of the child, while others grant judicial discretion. There is no single clear definition of the term, but it has become a universal standard. See, John C. Duncan, Jr., *The Ultimate Best Interest of the Child Enures from Parental Reinforcement: The Journey to Family Integrity*, 83 NEB. L. REV. 1240, 1251-1252 (2005); see also David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984) (discussing the difficulties of the best interest standard). According to the Supreme Judicial Court of Maine, the best interest of the child "may be determined by considering such factors as the needs of the child, the child's age, attachment to relevant persons, periods of attachment and separation, ability to integrate into substitute placement or back into parent's home, and the child's physical and emotional needs." *In re Ashley A.*, 679 A.2d 86, 89 (Me. 1998).

III. CHOOSING THE BEST LEGAL SYSTEM TO PROTECT OUR CHILDREN

A. *Bringing Child Protection Cases to Court*

Child protection cases may arise in multiple ways: (1) in some jurisdictions, the child protection agency²⁷ will petition the juvenile court directly; (2) in other jurisdictions, a juvenile court intake unit may make the petition; or (3) some states require the child protection agency to contact law enforcement in cases of serious physical or sexual abuse.²⁸ If the case is criminal, prosecutors utilize their discretion to determine which actions will be brought before the court.²⁹ State statutes provide both civil and criminal causes of action for child mistreatment.³⁰ However, bringing cases as civil actions is often preferred.³¹

²⁷ Child protective service units are most often administered by either the state or county department of social services. The unit is responsible for receiving reports of suspected child abuse and neglect, investigating these reports, determining whether there is probable cause that the child was abused and neglected, working with parents, and, if needed, petitioning the court to protect the children. DONALD KRAMER, *LEGAL RIGHTS OF CHILDREN*, 73 (2d ed. 1994). For an example of Children Protective Services Investigation procedure, see Texas Department of Family and Protective Services, Investigations, www.dfps.state.tx.us/Child_Protection/About_Child_Protective_Services/investigation.asp (last visited Oct. 18, 2006).

²⁸ KRAMER, *supra* note 27, at 83–84. There are also a number of states that permit citizens to bring a petition before the court. *See id.* at 84.

²⁹ *Id.*

³⁰ *Id.* Some states break down child abuse cases into to different categories of criminal offenses. For example, under the Michigan Penal Code:

A person is guilty of child abuse in the first degree if the person knowingly or intentionally causes serious physical or serious mental harm to a child. Child abuse in the first degree is a felony punishable by imprisonment for not more than 15 years. . . . A person is guilty of child abuse in the fourth degree if the person's omission or reckless act causes physical harm to a child. Child abuse in the fourth degree is a misdemeanor punishable by imprisonment for not more than 1 year.

MICH. COMP. LAWS § 750.136b (2005).

³¹ In determining whether to bring a criminal or civil action against the offender, prosecutors often consider factors such as: gravity of the offense, prior history of abuse and neglect by offender, availability and likelihood of successful alternatives to prosecution, and the care and protection of the child during the incarceration or treatment of the offender (particularly if the offender is a parent). KRAMER, *supra* note 27, at 83–84. Under state reporting laws or juvenile court codes, juvenile or family courts have jurisdiction over civil cases. Traditionally, the civil system is more open to helping the

The legal system provides two options for protecting children from child abuse: traditional litigation and the developing field of child protection mediation.³² An evaluation of the strengths and weaknesses of both processes,³³ in conjunction with recommendations to further improve the mediation process,³⁴ suggests that mediation is the best way to address child protection cases.

B. Litigation in Child Abuse and Neglect Cases

Child protection proceedings,³⁵ due to the unique legal issues and relationships involved, can be complex and involve numerous parties and multiple hearings.³⁶ Parties to the proceedings may include the parents, the child, and the agency initiating the legal action on the child's behalf.³⁷ An attorney may represent each party, and the child may be represented by an attorney, a guardian *ad litem*,³⁸ or both.³⁹

family. Judges in these cases can have broad jurisdiction over the family and a variety of dispositional options: "permit[ing] the child to remain at home under agency supervision, order treatment services for family, or, if necessary, remove the child from the home." *Id.* at 83–84. The judges in the juvenile and family courts may refer cases to mediation. *See* Libby Sander, *A Chamber for Children*, CHICAGO LAW DAILY BULLETIN, Apr. 23, 2005. In comparison, if a child protection case were to be brought as a criminal action, there is the potential danger that if the parent is tried and found not guilty, the child may be in even more danger. Further, because criminal cases require "proof beyond a reasonable doubt"—as opposed to civil actions typically requiring only "the preponderance of the evidence"—a criminal conviction may often be unattainable when a civil action would have prevailed. KRAMER, *supra* note 27, at 83–84.

³² *See generally* John Lande, Nat'l Ctr. For State courts, *Child Protection Mediation* (2001), available at www.ncsconline.org/d_icm/readings/icmerroom_lande.pdf (discussing the use of mediation in many types of litigation and the recent use of mediation in child protection cases).

³³ *See infra* Part III.B–C.

³⁴ *See infra* Part IV.

³⁵ Since it is preferable, as mentioned in *supra* note 30, to bring civil actions in child protection cases, when discussing litigation or trial, the remainder of this Note, unless specifically state otherwise, will be referring to civil actions.

³⁶ Edwards, *supra* note 7, at 59.

³⁷ *Id.*

³⁸ A guardian *ad litem* is "[a] guardian, usu[ally] a lawyer, appointed by the court to appear in a lawsuit on behalf of an incompetent or minor party." BLACK'S LAW DICTIONARY 713 (7th ed. 1999); *see generally*, Emily Buss, "You're My What?" *The Problem of Children's Misperceptions of Their Lawyers' Roles*, 64 FORDHAM L. REV. 1699 (1996) (discussing the role of a guardian *ad litem* and comparing and contrasting the child-guardian *ad litem* relationship to the child-traditional attorney relationship);

A typical proceeding begins with a shelter care or removal hearing.⁴⁰ Next, during the jurisdictional or adjudication hearing, the judge will determine whether the allegations in the petition are true.⁴¹ This hearing resembles the trial stage of other legal proceedings.⁴² If the petition is found to be true, a dispositional hearing will be held during which the court will lay out a plan for the child and the parents.⁴³ The law requires a permanency hearing, for children who are removed from a parent's home, to take place within one year of the removal.⁴⁴ As a result, throughout the year the court will review the case in order to monitor the progress toward reunification.⁴⁵

While court oversight has improved,⁴⁶ child protection cases present challenges that juvenile court oversight may not be equipped to overcome.⁴⁷ Common issues include: (1) the expense of court oversight,⁴⁸ (2) timeliness

KRAMER, *supra* note 27, at 530–546 (providing background information on guardians *ad litem*, procedural rules and statutes relating to a guardian *ad litem*, circumstances requiring the appointment of a guardian *ad litem*, authority and responsibility of a guardian *ad litem*, and a guardian *ad litem*'s immunity from suit and harassment).

³⁹ Edwards, *supra* note 8, at 59. Other interested parties often involved in child protection cases include: relatives, foster parents, legal guardians, stepparents, de facto parents, boyfriends/girlfriends, and the child's Court Appointed Special Advocate (CASA). These parties may also have attorneys representing them, thereby increasing the number of parties involved in the proceedings. *Id.*

⁴⁰ *Id.* At this hearing, usually held within a few days of removal, a judge will explain the petition filed on the child's behalf, review the process with the parties, making sure each party, including the child, is represented, and also determine where the child will live and whether the parents will have any visitation rights until the next hearing. *Id.*

⁴¹ *Id.*

⁴² *Id.* Parents, if they disagree with allegations in the petition, may ask for a trial at which the judge will hear and consider evidence in order to determine the validity of the statements. Prior to the hearing, a social worker typically prepares a report documenting reasons why the child needs the protection of the court. *Id.* at 59–60.

⁴³ *Id.* at 60.

⁴⁴ *See id.*

⁴⁵ *See id.*

⁴⁶ *See id.* Due to court oversight, standards and accountability have been brought to the child protection system. For example, courts review social worker decisions on removal and placement of children and create a forum for all parties to be heard. Further, an increase in permanent placement plans and shorter time periods in foster care have resulted from increased court oversight. *Id.*

⁴⁷ *See* Edwards, *supra* note 8, at 60–61; Firestone, *supra* note 8, at 203–207 (stating that common problems with litigation include: disempowerment of participants, destruction of relationships, time and expense of litigation, and exclusion of others).

⁴⁸ *See* Edwards, *supra* note 8, at 60 (stating that “the cost of hiring lawyers and having social workers spend a substantial part of their workday in court is significant”);

and permanency,⁴⁹ (3) problems for child protection agencies,⁵⁰ and (4) trauma created by the adversarial proceedings—particularly in child protection cases.⁵¹

This fourth issue is especially important in considering the problems that traditional litigation proceedings may create in child protection cases. The adversarial system's "legalization of human problems" fails to serve the best interest of children and generates feelings of disempowerment and dehumanization in participants.⁵² The system, while addressing the legal issues, loses sight of human familial problems, and as a result, fails to create a sufficient forum in which to improve family dynamics.⁵³ Likewise, it is not always appropriate to help dysfunctional families learn to function better.⁵⁴ Further, rules of procedure and evidence, as well as cross-examinations in court can be a terrifying experience for individuals who are inexperienced

Firestone, *supra* note 8, at 205 (considering the cost of court time, attorney fees, expert fees, and the cost of any necessary forensic reports that may be needed in child protection cases). It is also important to keep in mind that a vast majority of parties in family law cases can not afford counsel. They may be forced to make the decision between paying for effective counsel to represent them and paying for other services such as mental health counseling. Further, when attorneys are provided for families who cannot afford them, attorney's fees are often paid from the same budget that also pays social workers and, as a result, further drains greatly needed resources. See Firestone, *supra* note 8, at 205.

⁴⁹ See Edwards, *supra* note 8, at 59–60 (describing the multiple hearings and stages of child protection proceedings); Firestone, *supra* note 8, at 204 (considering a child's sense of time in regards to litigation proceedings).

⁵⁰ See Edwards, *supra* note 8, at 61. Protection agencies have to hire and maintain staff familiar with the law, are required to learn how legal decisions are made, and have to learn about the formality of court proceedings—nothing in their training prepares social workers for this. *Id.*; see also Firestone, *supra* note 8, at 61 (stating child protection agencies are required to hire lawyers to represent the agency, and to learn how evidence must be gathered and presented in court).

⁵¹ See Edwards, *supra* note 8, at 60–61; Firestone, *supra* note 8, at 203–204.

⁵² See Firestone, *supra* note 8, at 203–204. The best interest of the child in child protection cases is often defined as a legal problem when it is actually much more than that. The best interest of the child involves complex psychological, social, and legal issues. Unfortunately this complexity is often swallowed up by standard legal issues such as child support. As a result, family relationships and problems have become "legalized in such a way that the system loses sight of human problems in context and focuses only on addressing answers to legal issues," rather than attempting to recognize and understand family dynamics. *Id.* at 203.

⁵³ *Id.*

⁵⁴ *Id.*

with the law, such as parents.⁵⁵ As a result of these complex rules, parties may distort facts in order to fit them into "categorized requirements of law."⁵⁶

In addition to problems created for parents when criminal charges are pending, prosecutors' offices are often dissatisfied with child protection cases due to the leniency of sentences and juries which do not believe that parents could intentionally harm their children.⁵⁷ Instead of abuse, injuries are often viewed by jurors as the accidental result of parental discipline that can, and often should (in the juror's mind) be imposed.⁵⁸ One study reports that the majority of jurors believe that children can be easily manipulated into making false reports.⁵⁹ Further, more than one-third of jurors believe that victims should be expected to "resist abuse, cry for help, or flee."⁶⁰ As a result, jurors find children who fail to cry or show some emotion while testifying to lack credibility.⁶¹ Jurors also expect that a victim will immediately report abuse; any delay in a child's report may also result in a decrease in credibility from a juror's viewpoint.⁶² Prosecutors are often left with the difficult job of corroborating the child's story in order to add credibility to the child's testimony.⁶³

⁵⁵ See Edwards, *supra* note 8, at 60–61; Firestone, *supra* note 8, at 204.

⁵⁶ Firestone, *supra* note 8, at 204.

⁵⁷ U.S. Department of Justice, *Prosecuting Child Physical Abuse Cases: Lessons Learned From the San Diego Experience*, NATIONAL INSTITUTE OF JUSTICE UPDATE, May 1995, www.ncjrs.gov/pdffiles/pchphysab.pdf. During interviews conducted by the U.S. Department of Justice in 1993, many of the participating 600 prosecutors from San Diego revealed dissatisfaction with the leniency of sentences which were typically described as "mere slaps on the wrists." *Id.*

⁵⁸ *Id.*

⁵⁹ Victor V. Vieth, *Using Voir Dire to Reduce Juror Bias in Child Abuse Cases*, 11 UPDATE 7, (1998) available at www.ndaa-apri.org/publications/newsletters/apri_update_vol_11_no_7_1998.htm [hereinafter Vieth 1].

⁶⁰ *Id.*

⁶¹ *Id.* Note the difference between the child "competency" and "credibility." Competency is "the mental ability to understand problems and make decisions." BLACK'S LAW DICTIONARY 278 (7th ed. 1999). Credibility is "the quality that makes something worthy of belief." BLACK'S LAW DICTIONARY 376 (7th ed. 1999). Credibility is typically at issue, while competency is often presumed by statute. See 18 U.S.C. § 3509(c) (2000) (presuming that children are competent).

⁶² Vieth 1, *supra* note 59.

⁶³ Victor V. Vieth, *When a Child Testifies: Getting the Jury to Believe the Victim*, 17 ABA CHILD LAW PRACTICE 22 (1998) [hereinafter Vieth 2]. In order to convince a jury of the child's veracity, prosecutors need to make every effort in order corroborate the child's statement or testimony. Even the corroboration of a seemingly unimportant event, may

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Professionals have also stated that child involvement, particularly as a child witness, presents problems in litigation—both civil and criminal.⁶⁴ While most age ranges are difficult, the preschool and teenage years are the toughest to work with in child protection cases.⁶⁵ Preschoolers have short attention spans, and during testimony, they often become restless and may suddenly change the subject.⁶⁶ Teenagers, on the other hand, are often emotionally rebellious, embarrassed, or otherwise unwilling to cooperate with authorities during adversarial proceedings.⁶⁷ The preschooler's lack of focused attention and the teenager's defensive fronts do not mix well with the adversarial litigation process.

In summary, litigation in child protection cases imposes significant obstacles for all of the parties involved. Family issues are often lost amongst the entanglement of precise legal issues.⁶⁸ The complex and sometimes terrifying experience of testifying can result in factual distortions by the parties—particularly by parents who are inexperienced with the law.⁶⁹ Problems with juror bias in criminal cases and child witnesses in the adversarial setting also arise.⁷⁰ These issues suggest that the legal system should turn to a different method in order to effectively resolve child protection cases.

decrease jury bias. For example, if a child says it was raining the night of the incident, prosecutor should verify the weather on the day in question. Further, by reminding jurors that the child did testify under oath, that the child has no incentive to lie, that children are not capable of lying as convincingly as adults, as well as, reminding the jurors of any corroborating evidence, may increase the child's credibility with the jury. *See id.*

⁶⁴ 1 RICHARD LAYMAN, CHILD ABUSE 79, 82–83 (1990) (discussing experiences of James M. Peters, a senior attorney with National Center for Prosecution of Child Abuse, in regards to children as witnesses in abuse cases).

⁶⁵ *Id.* Primary school witnesses tend to be the most effective witnesses due to developed communication skills and accurate details. *Id.*

⁶⁶ *Id.* at 82.

⁶⁷ *See id.* at 83.

⁶⁸ *See* Firestone, *supra* note 8, at 203 (discussing the “legalization of human problems”).

⁶⁹ *See* Edwards, *supra* note 8, at 60–61; Firestone, *supra* note 8, at 204.

⁷⁰ *See* Vieth 1, *supra* note 59 (discussing the potential for juror bias); Vieth 2, *supra* note 64 (discussing potential ways to overcome jury bias).

C. Mediation in Child Protection Cases

1. What is Child Protection Mediation?

Mediation is a voluntary and consensual process of assisted negotiation in which a neutral party, a mediator, helps parties in conflict try to reach an agreement.⁷¹ Child protection mediation is an alternative after child welfare has removed children from their homes,⁷² and may be used at any point in child protection cases.⁷³ Child protection mediation is usually initiated by

⁷¹ See Lande, *supra* note 32. Mediators in child protection cases are usually attorneys or professionals in the field of behavioral sciences. Generally, there are no licensing or certification programs for mediators in child protection cases. For more on mediator qualifications in child protection cases, see *infra* Part IV.B.

⁷² Child protection mediation differs from child protection workers' clinical practice. Child protection workers typically take on a role as a state agent, which may often cause parents to feel disempowered and threatened. Mediators, in comparison, as neutral parties, should stress collaborative problem solving between the parties in order to negotiate the best outcome. In order to do so a variety of techniques are used by the mediator such as procedures that ensure parties receive relevant information, enable each party to be heard, generate creative solutions, and ultimately reach feasible solutions that all can accept and agree to. See HOWARD H. IRVING & MICHAEL BENJAMIN, FAMILY MEDIATION 400 (1995).

⁷³ Lande, *supra* note 32. A case may be referred to child protection mediation at any time from the initial hearing up to and including the establishment of a permanent plan, even those that may include termination of parental rights. Edwards, *supra* note 8, at 62. Mediation may be utilized at any point in a child protection case, provided certain criteria are met:

- (a) the child is in no immediate danger; (b) there are legitimate, child protection concerns about the child; (c) participation (and termination) are based on voluntary consent of all parties; (d) all parties are competent to negotiate for themselves, taking into account any uncontrolled mental illness, substance abuse problems, significant retardation, language impediment, or significant family violence; (e) there are no outstanding criminal charges related to the issues under negotiation; and (f) there are no ongoing family assessments.

IRVING, *supra* note 72, at 385. However, mediation should not be used to determine whether child abuse or neglect is taking place. If this issue is still in dispute, it may be necessary for a court order validating the child protection services allegations. It is possible that mediation may be inappropriate at one stage, but may be helpful at a later time (once all parties recognize there is a valid concern for the child's welfare and the issue of abuse or neglect is no longer in dispute). See IRVING, *supra* note 72, at 385. Further, as mentioned in *supra* Part III.A, prosecutors often prefer to bring civil as opposed to criminal actions in the context of child protection cases. State statutes imposing criminal sanctions often relate to egregious behavior: torturing, maiming,

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either a child protection worker or lawyer.⁷⁴ A mediator will meet with each party separately to explain the mediation process and assess the appropriateness of mediation in the particular case.⁷⁵ If the mediator deems the case appropriate for mediation, the parties will be brought together in a joint session during which the mediator will set ground rules and each party will be given an opportunity to present their issues.⁷⁶

The purpose of this particular mediation process is to develop a case plan to reunify the family as soon as possible.⁷⁷ If reunification is not possible, the goal of mediation becomes finding the most suitable permanent placement for the child within the time period established by law.⁷⁸ Mediated issues also often include the services the parents will use,⁷⁹ conditions that must be satisfied before the child may return home,⁸⁰ alternative options for child

burning, mutilating, and other willful acts which inflict unjustifiable pain upon the child. See KRAMER, *supra* note 27, at 17–18. In such instances where a child may be at risk of immediate danger, child protection mediation may not be appropriate. See ALISON TAYLOR, THE HANDBOOK OF FAMILY DISPUTE RESOLUTION 373 (2002). Due to these reasons, and the fact that juvenile or family courts have jurisdiction over civil cases—thereby streamlining the process to child protection mediation—this Note, unless specifically stated otherwise, will be discussing mediation in regards to civil, as opposed to criminal, cases only. See KRAMER, *supra* note 27, at 83.

⁷⁴ IRVING, *supra* note 72, at 382. Child protection workers and lawyers are more likely than parents to initiate the process, because they are usually more familiar with the concept of mediation. *Id.*

⁷⁵ *Id.* The mediator may choose to meet with the child protection worker first, since the child protection worker may be best able to explain the family involvement in the protective proceeding. The mediator, however, must be careful not to take sides with the child protection worker and instead must demonstrate to all parties that he or she is an independent party and has no interest in a specific outcome. *Id.*

⁷⁶ *Id.* The issues the parties present in the joint session have mostly likely already been discussed in the separate discussions held with only the mediator. The mediator should explain that restating the issues allows not only for the mediator to better understand the issues, but may also provide an opportunity for the parties to see the issues differently. *Id.*

⁷⁷ “Throughout, the mediator should encourage open and constructive communication and help the parties identify areas of mutual interest, especially the child’s welfare and the obvious benefits of amicable resolution.” *Id.* at 383.

⁷⁸ Lande, *supra* note 32.

⁷⁹ In order for the child to return home, the mediation agreement may require the parent to participate in certain services such as: counseling, drug and alcohol assessment and treatment, parenting classes, employment and housing referrals, and financial assistance. See *id.*

⁸⁰ IRVING, *supra* note 72, at 382.

care,⁸¹ and parenting practices, including alternative nonviolent approaches.⁸² During the course of child protection mediation, parties may discuss problems arising during the implementation of the case plan and court order, agree to modify the case plan, or agree to allow the court to modify the order.⁸³ If the parties reach an agreement, the mediator will prepare a "memorandum of understanding."⁸⁴

2. Benefits of Child Protection Mediation

Utilizing child protection mediation instead of traditional litigation provides benefits for all of the parties involved.⁸⁵ Although professionals have admitted to being leery of child protection mediation, once they are exposed to the process, any prior resistance is typically short-lived.⁸⁶ In fact, the relationships between attorneys, social workers, and parents often improve throughout the course of the mediation.⁸⁷

⁸¹ *Id.* These alternative options may include: discussing temporary and permanent placement of the child, scheduling visitation by parents, siblings, and other family members, and making arrangements for any necessary supervision and transportation. For example, in heading towards reunification, the parties may agree to plans with successive stages in which the parent gradually spends more and more time with the child. *Id.* at 383.

⁸² IRVING, *supra* note 72, at 382. Mediators must deal with both the direct and obvious, as well as underlying issues. *See id.* at 382; *see also* Lande, *supra* note 32 (listing issues that participants in child protection mediations may discuss).

⁸³ Lande, *supra* note 32.

⁸⁴ IRVING, *supra* note 72, at 383. The understanding may be formalized by the parties, along with their lawyers, by requesting an "order of consent" from the court or by drafting "voluntary provision of service agreement" (also referred to as "voluntary plan of care"). *Id.*

⁸⁵ *See generally* Edwards, *supra* note 8, at 65 (stating mediation has a positive impact on parties involved).

⁸⁶ *See id.* at 63-64; Lande, *supra* note 32. Some participants in child protection mediation programs in Santa Clara County worried that mediation would sacrifice child safety in the interest of making an agreement, and attorneys and judicial officers did not want to give up control. However, as participation in the program evolved and increased, satisfactory results were produced and the program became an established part of the court process. Edwards, *supra* note 8, at 63-64.

⁸⁷ *See* Edwards, *supra* note 8, at 65; *see also* Sander, *supra* note 31 (quoting Stefanie Blank, a lawyer with the Public Guardian's office in Chicago: "I think it's helpful for parents to realize I'm not the enemy . . . and there have been situations where I've felt like I needed more information about a case to come to a conclusion, and mediation has been good for that.").

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A basic goal of child protection mediation is to expedite permanency for the child.⁸⁸ The mediation's success is often judged in terms of the amount of progress obtained rather than in settlement dollar amounts.⁸⁹ The value of the mediation should be based on whether it leads to better outcomes for children and their families.⁹⁰ Statistics show the success of the programs: 60%–85% of child protection mediations end in an agreement between the parties.⁹¹ Evaluations of ten child protection mediation programs in California and Texas showed that a full or partial agreement was reached in at least 70% of the cases.⁹² Participants, often preferring the program to judicial hearings, found the case plans developed during mediation tended to be more creative and detailed.⁹³ A course of action reached by parents, social workers, and attorneys working together as a team is more likely to lead to family progress, as opposed to a traditional judicial decision where it feels much

⁸⁸ See Lande, *supra* note 32. Permanency does not necessarily mean returning the child to his or her parents. During child protection mediations "concurrent planning" often takes place. This involves developing one plan for reunification, and if this is not possible, an alternative plan giving the child permanency. This alternative plan may be preparing to promptly place the child up for adoption if parental rights are terminated, or determining if a relative would have custody or adopt the child if parental rights were terminated. *Id.*; see also Miriam J. Landsman, Kathy Thompson, & Gail Barber, *Using Mediation to Achieve Permanency for Children and Families*, 84 FAM. IN SOC'Y 229, 234 (2003) (on file with the author) (defining permanency to include reunification with families, adoptive placements, preadoptive placements, long-term foster care, and guardianship agreements).

⁸⁹ See Sander, *supra* note 31.

⁹⁰ See IRVING, *supra* note 72, at 387.

⁹¹ *Id.* at 387.

⁹² See Lande, *supra* note 32. Five programs were in California and five were in Texas. See Landsman, *supra* note 88, at 234. The Iowa Mediation for Permanency Project (IMPP) documented progress of a select group of families involved in child welfare mediation. The study involved 210 children. At the end of the mediation, permanency status was available for a majority of the children: 65 were in adoptive placements, 42 were in preadoptive placements, 26 were reunited with their families, 11 were in long-term foster care, 30 were in foster care, 3 had a guardianship agreement, and 6 were classified as "other." *Id.*

⁹³ See Landsman, *supra* note 88. Parental satisfaction also resulted from having an opportunity to be heard and to better understand the process. Participants also believed that the mediation process saved both time and money. See Edwards, *supra* note 8, at 65 (stating parents are more satisfied because the mediation process gave them the opportunity to air grievances and concerns).

more like a win-lose situation.⁹⁴ Mediation in these types of cases can actually increase compliance with court orders.⁹⁵ If parents feel they are being heard, they may be more likely to participate in all aspects of the case.⁹⁶ In practice, at least one child protection mediation program has also had the unforeseen result of making the court run more efficiently.⁹⁷

The benefits of the mediation process to participants such as parents, attorneys, and social workers, along with the incidental benefits to the court, suggest that the mediation process—as opposed to adversarial litigation—is a more effective route to resolve child protection cases.

IV. DEVELOPING MEDIATION IN THE BEST INTEREST OF THE CHILD

While mediation may provide benefits which litigation cannot, many aspects of this process can be improved. Particularly, the involvement of the child in the mediation process, as well as developed standards for mediators, can increase the benefits of mediation in child protection cases.⁹⁸

A. Involving the Child

If child protection cases are to be resolved in the best interest of the child,⁹⁹ it makes sense to involve the child, at least at some point in the chosen process.¹⁰⁰ In traditional litigation, children are often placed in the

⁹⁴ See Janet Weinstein, *And Never the Twain Shall Meet: The Best Interest of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 86–87 (1997) (describing the adversary process as a win-lose competition).

⁹⁵ See Lande, *supra* note 32.

⁹⁶ See Weinstein, *supra* note 94, at 154–55. Participants who feel as though they have some control over the outcome of their problems are more likely to perceive the process as fair, and as a result, there should be a better chance for future cooperation between the parties. *Id.*

⁹⁷ See Sander, *supra* note 31. During its first year, judges referred forty-five cases to the Cook County child protection mediation program in Illinois. Three years later, referrals increased to 463, accounting for about 4% of all cases in the child protection system.

⁹⁸ See TAYLOR, *supra* note 73, at 373 (stating that experience has shown that most often children are in a better position than agencies, systems, and sometimes even parents, to determine the best solutions); *infra* Part IV.B.1–2 (discussing the current lack of standards for mediators in children protection cases and proposing standards which may generate a positive impact on the process).

⁹⁹ See *supra* note 26 (explaining the “best interest” standard).

¹⁰⁰ See *infra* Parts IV.A.1–2.

traumatic position of taking sides against one or both of their parents.¹⁰¹ In the mediation process, children are frequently a “side note” to the list of participating parties.¹⁰² Children should be involved in the process for two main reasons. First, in serving their best interests, children are the most appropriate sources of defining what these best interests may be—by telling what happened and their feelings about it.¹⁰³ Secondly, involving children in the mediation can foster or improve the child-parent relationship.¹⁰⁴

1. *Using Children to Help Define “The Best Interest of the Child”*

Addressing the best interest of children seems to naturally lead to involving the children in the process.¹⁰⁵ Many people hesitate to involve children in processes such as litigation and mediation because they believe the children are incapable of correctly recalling events, can be possibly

¹⁰¹ See Firestone, *supra* note 8, at 206 (stating the view that it is often best to keep the child out of the “conflict arena” of litigation, and expressing the concern that the value of a child’s statements in testimony may be misunderstood or that the child’s view may not be brought in front of the court of all); see also LAYMAN, *supra* note 64, at 79–88 (discussing child’s testimony in abuse litigation).

¹⁰² See TAYLOR, *supra* note 73, at 372–373. A benefit of mediation is the number of people who may be involved. Common participants include: foster parents, attorneys, CASA, justice system program staff, doctors, and family members or relatives. Children are notably left out of the list. See Landsman, *supra* note 88, at 233 (stating that mediators work with all parties who have a stake in a child’s permanency plan, but fails to include the child in the list of participants). See also IRVING, *supra* note 72, at 381 (defining mediation as typically confined to parents and the child protection worker, but may also include “other parties” such as the child. For example: if parents and worker agree the child should return to the home, but parent and child disagree as to curfew, then child may be included in the mediation); Lande, *supra* note 32 (including on children who “are mature enough”).

¹⁰³ See generally TAYLOR, *supra* note 73, at 373 (suggesting that if the mediation is about the child, it makes sense to include the child and allow him or her to voice his or her position).

¹⁰⁴ See *infra* Part IV.A.2 (discussing the impact of child protection mediation on the parent-child relationship).

¹⁰⁵ See TAYLOR, *supra* note 73, at 373. Taylor’s experience has shown that even when agencies, systems, and parents are trying to make a decision in the child’s best interest, most often the child is the one who can “determine the best solutions and the points of resistance of the participants within the family.” Taylor suggests that it may be unethical practice to conduct a mediation about children without giving children the opportunity to voice their own concerns and interests. *Id.*

unreliable, or are unable to communicate effectively.¹⁰⁶ However, while young children's recall and communication skills may not be as fully developed as those of adults, research suggests that children, even young children, are developed enough to be helpful in cases.¹⁰⁷ Between the ages of three and four, children use and understand sentences; use sentences involving time concepts, and are able to retell prior experiences.¹⁰⁸ Once children are between the ages of four and five, they can understand order and process, use "because" and "so" to refer to causality, and understand the sequencing of events.¹⁰⁹ Children's memory is also developed at a young age.¹¹⁰ Children as young as three years old have the ability to recall events they have experienced.¹¹¹ Research indicates that even four year olds can

¹⁰⁶ See generally LAYMAN, *supra* note 64, at 82 (discussing challenges in child abuse cases that arise from developmental differences in children as well as biases that it may create in the court system).

¹⁰⁷ See PBS, *Thinking Skills*, <http://www.pbs.org/wholechild/abc/cognitive.html> (last visited Sept. 30, 2006) [hereinafter *Thinking Skills*] (summarizing the work of scientists from various fields relating to children's progress in developing perceptual and thinking skills); PBS, *Communication Skills*, <http://www.pbs.org/wholechild/abc/communication.html> (last visited Sept. 30, 2006) [hereinafter *Communication Skills*] (summarizing research conducted on children's progress in developing communication skills); see also Nicholas Bala et al., *Judicial Assessment of the Credibility of Child Witnesses*, 42 ALTA L. REV. 995, 999 (2005) (discussing psychological research on children's ability to serve as a witness); John E.B. Myers, Karen J. Saywitz & Gail S. Goodman, *Symposium: Child Abuse: Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 PAC. L.J. 3, 7-12 (1996) (discussing children's memory ability); Wallace J. Mlyniec, *A Judge's Ethical Dilemma: Assessing a Child's Capacity to Choose*, 64 FORDHAM L. REV. 1873, 1873-81 (1995) (discussing the theory of Jean Piaget, arguably the most influential researcher in area of child development, on cognitive development of children). Piaget's theory is based on four levels of development. By level 2, occurring between the ages of two and seven, children gain a facility for language and move from basic problem solving based on sight and sound, to "incipient logical thought." By level 4, ages 11 to 15, children are able to hypothesize and draw deductions. *Id.*

¹⁰⁸ *Thinking Skills*, *supra* note 107; *Communication Skills*, *supra* note 107.

¹⁰⁹ *Communication Skills*, *supra* note 107.

¹¹⁰ Myers, *supra* note 107, at 7. "[R]esearch indicates that children including preschool-age children have good memory ability." *Id.*

¹¹¹ See *id.* at 26 (stating while children to have basic memory capacity and recall, suggestive questioning may distort a child's memories).

provide accurate information about events that happened to them one to two years earlier.¹¹²

Since mediation tries to present an open rather than an adversarial forum for participants, children may best communicate their experiences and feelings in the supportive atmosphere of child protection mediation.¹¹³ The mediator and other participants can then use this information to better serve the best interest of the child.

2. Involving Children in Mediation Can Foster and Improve the Child-Parent Relationship

In addition to most effectively defining the best interest of the child, an efficient method is needed to resolve issues of child abuse while also fostering the relationship between the parent(s) and the child, if reunification is to be a success.¹¹⁴ Statistics show that children from single parent homes were 77% more likely to be abused.¹¹⁵ In cases such as these, the child protection mediation process must provide a forum that can foster and support development in the child-parent relationship—since this is the child's only parent.

¹¹² Bala, *supra* note 107, at 999 (stating children are more likely to consistently recall information about “core elements” of an experience as opposed to “peripheral elements,” suggesting that children can be a valuable witness for the basic elements of an event).

¹¹³ See Myers, *supra* note 107, at 48. Courts recognize that the child might be unable to discuss the incident until he or she believes that they are safe in the presence of a compassionate adult whom he or she can trust. *Id.*

¹¹⁴ See Weinstein, *supra* note 93, at 87–88 (stating the process, such as traditional litigation which “pits family members against each other” is not conducive to fostering the family relationship, especially when family members are pitted against “those who are attempting to strengthen the family in order to safely maintain the relationship”).

¹¹⁵ See Perry, *supra* note 10. It has been suggested that this increased level of risk results from the stress and pressure of single parenthood. Single parents are often isolated from support resources that could decrease the burdens of single parenting. Single parent families are not the only group subject to heightened risk of child abuse or neglect. Compare children from families with annual income of less than \$15,000 to those families earning \$30,000 a year. Under the harm standard, children from lower income families were about sixteen times more likely to be physically abused. Under the endangerment standard, abuse was twelve times more likely for low income children. *Id.* For an explanation of harm and endangerment standards see *supra* note 12 and accompanying text.

Often in child protection cases, children will cover up for abusive parents stating, "I can't remember," or, "It was an accident."¹¹⁶ Children who have been physically abused by a parent often feel betrayed, and as a result, they have difficulty trusting others.¹¹⁷ For these children, the litigation process can be a difficult experience when they are surrounded by adults who are fighting each other and asking them to take sides.¹¹⁸ All children, but especially adolescents, are more likely to disclose abuse to an adult with whom they have developed a trusting relationship.¹¹⁹ The non-adversarial context of the mediation process can provide the opportunity, if the child is included as a party, for the child to see adults working together. In turn, this may allow the child to place trust in these adults, and thus empower them to join in the discussion and process leading to an agreement in their best interest.¹²⁰

Mediation allows children to feel as though they can talk to their parent(s) rather than feel forced to choose sides against them—as they often feel in a litigation proceeding.¹²¹ Professional mediators report that mediation is generally an effective tool for parent-child communication.¹²²

¹¹⁶ See Perry, *supra* note 10, at 198. Unfortunately, many children have experienced child abuse from a young age. As a result they may think this type of behavior is normal. *Id.*; see Weinstein, *supra* note 94, at 124 (discussing that even though a child has been seriously abused or neglected, children's loyalty to their parents is typically so strong that despite the abuse and neglect they want to be with their parents and may feel guilty about participating in the proceedings).

¹¹⁷ See CONNELLY, *supra* note 19, at 32–33. "When a parent, who is supposed to be loving and nurturing . . . physically abuses a child, the victim feels betrayed and has difficulty trusting others." *Id.*

¹¹⁸ See Weinstein, *supra* note 94, at 116 (stating during litigation children are often aware that parents are involved in a dispute about them, and often the child is forced to take sides).

¹¹⁹ Perry, *supra* note 10, at 198 (stating a child is likely to discuss abuse with adults such as teachers or counselors if a trusting relationship has developed).

¹²⁰ See generally Weinstein, *supra* note 94, at 87–88 (suggesting the mediation process as a means to avoid the adversary process that creates win-lose competition which "pits" family members against one another and creates an environment that is not conducive to an attempt to strengthen the family and safely maintain relationships).

¹²¹ See *id.* at 116.

¹²² See Matt Kramer, *Mediative Solutions For Parents and Children At Impasse*, www.mediate.com/articles/kramer.cfm (last visited Oct. 18, 2006) [hereinafter Matt Kramer]; see generally Jim Eisele, *Parent Child Mediation*, Mar. 2003, www.mediate.com/articles/eiseleJ1.cfm (suggesting parent child mediation can improve parent/child communication); Suzanne VM Petryshyn, *Parent Teen Mediations – A Family Systems Perspective*, Dec. 2004, www.mediate.com/articles/petryshns1.cfm

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Often the children are cooperative and willing to follow the rules of the mediation process.¹²³ For some, this is the first time they are able to express themselves without the censorship or interruption of their parents.¹²⁴ Mediation can provide a safe atmosphere in which it may be possible for children to trust others rather than feel placed on trial in the adversarial litigation process.¹²⁵

B. *Standards for Mediator Qualification, Training, and Certification*

1. *Current State of Child Mediators*

Due to the sensitive nature of the issues involved in child protection cases, it is important that mediators be trained and prepared to deal with family dynamics.¹²⁶ In child protection mediation, mediators are usually attorneys or professionals in the behavioral sciences.¹²⁷ Mediators are typically employed by juvenile courts as employees or contractors.¹²⁸ Unfortunately, there are generally no licensing or certification systems for child protection mediators.¹²⁹ Problems with current standards arise from the fact that they are overly general in relating to “family issues” or are too particular to divorce and domestic spousal abuse cases.¹³⁰ Some state statutes

(suggesting that Parent Teen Mediation promotes communication between parents and their children, and gives the family the opportunity to “promote understanding” in order to resolve issues).

¹²³ See Matt Kramer, *supra* note 122.

¹²⁴ See *id.*

¹²⁵ See Weinstein, *supra* note 94, at 116 (discussing the child’s awareness of litigation proceedings and the feeling of having to “choose sides”).

¹²⁶ “If naturally occurring families are complex, the structure of many families in these [child protection] situations is even more complex.” TAYLOR, *supra* note 73, at 363.

¹²⁷ Lande, *supra* note 32.

¹²⁸ *Id.*

¹²⁹ *Id.* See *infra* Parts IV.B.2.a–b. for a discussion of recommendations for changes in this area of mediation.

¹³⁰ See ALA. CODE § 6-6-20(f) (2005) (requiring mediators to be trained in domestic and family violence in a specialized manner that protects the safety of the victim); ALASKA STAT. § 25.20.080 (2004) (requiring family mediators to be specially trained in domestic violence for child custody in divorce cases); CAL. FAM. CODE § 1816 (West 2004) (stating that areas of instruction in mediator training must include: “effects of domestic violence on children”, “the nature and extent of domestic violence”, as well as “techniques for identifying and assisting families affected by domestic violence”); MD. R. 17-106 (1999) (requiring child access mediation training including Maryland law relating to separation, divorce, annulment, child custody and visitation, child and spousal

require basic training in child abuse, but they fail to set specific guidelines for this training.¹³¹ Child protection mediation cases address important issues, namely family reunification. Because children's needs are different in child abuse cases, standards of mediators and court mediation programs should be specifically designed for these scenarios.¹³²

Currently, under the *Model Standards of Practice for Family and Divorce Mediators*, Standard II reads: "A family mediator shall be qualified by education and training to undertake the mediation."¹³³ Under this standard, to effectively perform the family mediator's role, a mediator should: (1) be knowledgeable about family law; (2) be aware of the psychological impact of family conflict on parents, children, and other family members, with education and training in domestic violence and child abuse and neglect; (3) have special education and training in the process of mediation.¹³⁴ While this may be a good start, more precise qualifications need to be required of child protection mediators in particular in order to best meet the interest of the child.¹³⁵

Under the current standards,¹³⁶ there is little or no guidance for determining necessary mediator licensing or certification in child protection cases. While the *Model Standards for Family and Divorce Mediators* may

support, and instruction relating to screening for and addressing domestic violence); NEB. REV. STAT. § 43-2904 (2005) (requiring mediators be trained to "recognize" domestic violence); N.H. REV. STAT. ANN. § 328-C:5 (2004) (requiring mediators to have eight hours of domestic violence training); OR. REV. STAT. § 107.755 (2006) (requiring mediators to participate in continuing education in domestic violence); S.C.R. FAM. CT. RULE 11 (requiring mediators to be trained in conflict resolution, family dynamics, and specific training in regards to domestic violence);

¹³¹ PA. R. CT. 1940.4(a)(2) (requiring "basic training in domestic and family violence or child abuse").

¹³² In divorce and domestic violence cases, while children are a consideration, they are not the focus of the mediation as in child protection cases. For example, divorce mediations encompass a range of issues including: marital property, spousal support, and child support and custody. See, IRVING, *supra* note 72, at 32-37.

¹³³ MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION, STANDARD II (2000).

¹³⁴ *Id.*

¹³⁵ For more on the "best interest of the child" see *supra* note 26 and accompanying text.

¹³⁶ For references to current state laws on mediation in family law see *supra* note 130.

provide the basics for mediator training,¹³⁷ more specific requirements are needed.

2. Recommendations for Child Mediator Qualification and Training

Some participants in child protection mediation have expressed the concern that "[the] mediator training lacked specific information in child protection law."¹³⁸ How can this be fixed? The San Diego Police Department has a specialized unit of fourteen investigators who handle all physical abuse, severe neglect, and sexual abuse cases.¹³⁹ All of the investigators must request to be put on this particular assignment and then they must attend training.¹⁴⁰ Due to their specialization, the investigators have developed a working relationship with the San Diego Prosecutor's Office.¹⁴¹ Creating a similar specialized team of mediators—as opposed to investigators—could make the mediation process more efficient and better serve the best interest of children. In creating an adequate training program for child protection mediators, it may be helpful to consider the views of other professionals in the child welfare and care arena.¹⁴² Social service workers, doctors, nurses, educators, and police—all common participants in child protection cases¹⁴³—have suggested three different areas of content to be included in training for these particular cases: (1) information, (2) skills, and (3)

¹³⁷ MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE MEDIATION (2000) (providing general requirements including: (1) knowledge about family law; (2) awareness of the psychological impact of family conflict on family members; and (3) special education and training in the process of mediation).

¹³⁸ Kelly Browne Olson, *Child Protection in the 21st Century: Lessons Learned from a Child Protection Mediation Program: If at First You Succeed and then You Don't . . .*, 41 FAM. CT. REV. 480, 489 (2003). Other areas of participant concern included: "(1) short time periods for detailed mediations, and (2) limited opportunities for early interventions due to lack of pre-adjudication mediations." *Id.*

¹³⁹ See U.S. Department of Justice, *supra* note 57.

¹⁴⁰ *Id.* All investigators participating in this specialized unit are required to attend four training classes conducted by the State of California on various aspects of investigating child abuse. *Id.*

¹⁴¹ *Id.*

¹⁴² See generally MARGARET BELL, CHILD PROTECTION: FAMILIES AND THE CONFERENCE PROCESS 85 (1999) (discussing the multi-disciplinary work involved in child protection mediation).

¹⁴³ See *id.* at 372 (listing potential participants in child protection cases).

sensitivity awareness.¹⁴⁴ Incorporating these specific topics into the mediation process can increase the benefits and effectiveness of child protection mediation and further the best interest of children.¹⁴⁵

a. Training

Developing a training program based on the above-mentioned areas—information, skills, and sensitivity awareness—may fill the voids in child protection mediation and increase the success rates of these mediations. First, mediators should be informed of both the legal situation and their role as a leader in the process.¹⁴⁶ This does not necessarily mean that mediators must be licensed attorneys or even that they should have a law degree. Training on the legal issues involved in child protection mediation can focus on the narrow and specialized legal topics that arise during the course of child protection mediation, such as custody and visitation rights.¹⁴⁷ As with other professionals in the legal field, mediators should be required to attend continuing education classes when necessary to continue to educate themselves about developments in the field. While continuing legal education (CLE) classes are typically mandatory for bar-certified attorneys,¹⁴⁸ very few states currently require mediators to attend continuing mediation education (CME) classes.¹⁴⁹

¹⁴⁴ See *id.* at 93. A study was performed to establish the attitudes of professionals with experience in child protection mediation cases with parental involvement. In the course of the study, among other issues such as policies and procedures for parental involvement, participants—a group of multi-disciplinary professionals who regularly participate in child protection mediation—discussed views on what training for these cases should include. See *id.* at 87, 93, 95.

¹⁴⁵ For suggestions on how to best incorporate these topics into child protection mediation see *infra* Part IV.B.2.b.

¹⁴⁶ See BELL, *supra* note 142, at 93. Bell uses terminology of “chair” as opposed to leader in the mediation. *Id.* at 92–93.

¹⁴⁷ See IRVING, *supra* note 72, at 382–83 (listing mediated issues and discussing parental goal of regaining custody).

¹⁴⁸ Forty states currently require lawyers to participate in mandatory continuing legal education classes in order to practice law in that particular jurisdiction. For a summary on each state’s requirements, see American Bar Association, Summary of MCLE State Requirements, www.abanet.org/cle/mcview.html (last visited Sept.30, 2006).

¹⁴⁹ Indiana and Florida are two of the few states requiring continuing education for mediators. Registered mediators in Indiana courts are required to complete a minimum of six hours of approved continuing mediation education within a three year educational period. These educational periods are sequential, and once a mediator’s particular three

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Neutrality is essential to the mediation process.¹⁵⁰ If a parent feels as though the mediator is truly impartial, open, and listening, the parent is more likely to be willing to take part in the mediation, reach an agreement, and follow the terms of the agreement.¹⁵¹ As with all mediations, if the mediators find that they are unable to remain impartial, they should terminate the mediation until they can be replaced.¹⁵²

Important communication skills such as assertiveness, being open, report writing, and presentation of both self and materials are crucial to the process.¹⁵³ Throughout the training process, these skills can be evaluated through two different mediums.¹⁵⁴ First, potential mediators may be given a “test” which asks them to describe both potential issues arising in

year period terminates, a new six hour minimum CME requirement and three year period begin. For more information on Indiana’s CME requirements for registered mediators, CME reporting requirements for registered mediators, and accreditation policies and procedures for CMEs, see Indiana Rules of Court: Rules for Alternative Dispute Resolution Rule 2.5, *available at* www.in.gov/judiciary/rules/adr/. Similarly, Continuing Mediation Education is also required for all mediators certified by the Supreme Court of Florida. Mediators are required to complete at least sixteen hours of CME—four hours of which must be devoted to mediator ethics—in each two year renewal cycle. Additionally, family and dependency mediators must complete four of the sixteen required hours in domestic violence training. For more information on Florida’s CME requirements see, Florida State Courts www.flcourts.org/gen_public/adr/cmequestions.shtml (last visited Oct. 18, 2006).

¹⁵⁰ See IRVING, *supra* note 72, at 395.

¹⁵¹ See Weinstein, *supra* note 94, at 154–55 (stating parties who feel like they have some control and say in the process are more likely to reach an agreement and follow the terms of the agreement). In contrast, parents who are accustomed to making the decisions in terms of their children can feel disempowered by the litigation process. Rules of procedure and evidence often work to frustrate parents and make it more difficult for them to participate. See Firestone, *supra* note 8, at 204; *see also*, Edwards, *supra* note 8, at 60–61 (describing the adversarial process as a “brutal and terrifying experience” for those inexperienced with the law, especially when being questioned about family matters).

¹⁵² See IRVING, *supra* note 72, at 396.

¹⁵³ See BELL, *supra* note 142, at 93 (discussing the results of a survey taken by multi-disciplinary professionals who regularly participate in child protection mediation).

¹⁵⁴ See generally Association for Conflict Resolution and Dispute Resolution Section of the American Bar Association, *Mediator Certification Feasibility Study*, Spring 2005, *available at* www.acrnet.org/pdfs/certificationresults2005.pdf [hereinafter ACR and ABA Mediator Study](showing that in 2001, out of over 3100 surveyed mediators, 46% of participants thought a practical examination such as a simulated mediation should be used to assess the abilities of mediator candidates and 42% thought a written examination should be required before allowing an individual to become a mediator).

hypothetical mediation scenarios, and the potential mediator's response or reaction to these issues.¹⁵⁵ Second, communication and presentation skills may be evaluated through "mock mediations" during which potential mediators engage in role playing as well as team mediations in which inexperienced and experienced mediators work together in actual child protection mediations.¹⁵⁶

Finally, due to the emotional nature of these cases, child protection mediators should have a heightened degree of sensitivity awareness, including awareness of participants' feelings, racial or religious issues, and the use of language or jargon used during the mediation.¹⁵⁷ This third level of training may be completed in part with role playing and mock mediation along with instructional training by behavioral sciences professionals.¹⁵⁸

b. Certification

In the spring of 2005, the American Bar Association (ABA) and the Association for Conflict Resolution (ACR)¹⁵⁹ conducted a Mediator Certification Feasibility Study.¹⁶⁰ With close to half of the survey's participants involved in family mediation,¹⁶¹ certification in family mediation, specifically child protection mediation, is not unreasonable.

¹⁵⁵ See *id.* (stating that 42% of surveyed mediators thought a written test should be given before an individual became a mediator).

¹⁵⁶ For example, in order to qualify as a mediator for Florida State Courts, four hours of observation conducted by a court-certified mediator as well as four hours of conducting mediation conference under the supervision of a court-certified mediator is required. See Florida Rules for Certified and Court-Appointed Mediators, Rule 10.100, available at, www.flcourts.org/gen_public/adr/certify.shtml.

¹⁵⁷ See BELL, *supra* note 142, at 93.

¹⁵⁸ See *id.* at 92–93 (stating that role playing is an effective method of learning ways of presenting sensitive information about abuse and encouraging interaction amongst professionals).

¹⁵⁹ The Association for Conflict Resolution (ACR) is a professional organization devoted to enhancing the practice, as well as the public's understanding of conflict resolution. For more information on ACR, see The Association for Conflict Resolution, www.acrnet.org (last visited Oct. 18, 2006).

¹⁶⁰ ACR and ABA Mediator Study, *supra* note 154. As part of a mediator certification study, an online survey of attitudes on issues relating to certification was conducted jointly by the ABA and the ACR. Over 3,100 individuals responded. *Id.*

¹⁶¹ See *id.* The study provides fourteen different mediation categories for participants in the study to choose from. Family mediation came in third at 43%. Workplace and civil court mediations were the top categories with 47% and 44%, respectively. *Id.*

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Participants were asked what method should be used to assess the knowledge, skills, and abilities of a mediator; 84% recommended submission of prior training and education in knowledge areas related to mediation, 72% suggested only proof of prior mediation experience, and 42% called for a practical examination, such as a simulated mediation.¹⁶²

The ACR guidelines require at least one hundred hours of training or academic coursework in conflict resolution, documentation of hours of mediation or active co-mediation within the last five years, three letters of reference from individuals familiar with the applicant's mediation work, and disclosure of any criminal convictions and professional disciplinary actions.¹⁶³ These guidelines can be combined with previously discussed training components to create a certification program for child protection mediators.¹⁶⁴

First, child protection mediators should be required to complete one hundred hours of training or academic coursework in conflict resolution,¹⁶⁵ with additional requirements that at least forty of these hours must be dedicated to the particular legal issues involved in child protection mediation, and at least five hours must be dedicated to the mediator's role and responsibilities in mediation.¹⁶⁶ The minimum forty-five hours combined would satisfy the "information" component of the training.¹⁶⁷

Second, a minimum of twenty hours should be dedicated to the "sensitivity awareness" component of the training taught by professionals in

¹⁶² *Id.* Other suggestions included a written examination (42%) and submission of a portfolio of case studies (27%). Participants in the survey were encouraged to choose all methods they thought should be used. *Id.*

¹⁶³ *Id.*

¹⁶⁴ See *supra* Part IV.B.2.a.

¹⁶⁵ Currently only twenty seven state bar associations report that their state has mandatory training requirement for any in-court annexed context. The amount of required hours ranges from fourteen to ninety-four. See AMERICAN BAR ASSOCIATION, SECTION OF DISPUTE RESOLUTION, ABA STATE AND LOCAL BAR ALTERNATIVE DISPUTE RESOLUTION SURVEY 8-9 (2001), www.abanet.org/state/oral/summaryreport.pdf.

¹⁶⁶ Continuing Mediation Education in Florida—one of the few states requiring mediator training and continuing education—"shall be conducted by an individual or group qualified by practical or academic experience." Supreme Court of Florida, Administrative Order Rules Governing Mediator Certification, No. AOSC06-9 (2000), available at www.mediationtrainingcenter.com/images/Florida_Supreme_Court_Administrative_Order_AOSC06-9_MTC_.pdf.

¹⁶⁷ See BELL, *supra* note 142, at 93 (reporting views of professionals in the field which suggested that training for mediators in child protection cases should include an "information base" component).

the behavioral sciences.¹⁶⁸ This will inform and alert mediators to the potential emotional concerns and issues that may affect the family and the child during child protection mediation.¹⁶⁹

Finally, potential mediators should be required to spend a minimum of twenty hours of role playing in mock mediations and participating in team mediations. Because working with children may be the most challenging part, more time should be dedicated to the latter, where children are present.¹⁷⁰ This will satisfy the “skills training” component of the training,¹⁷¹ since prospective mediators’ communication skills will be observed by current practicing child protection mediators.

Once these three levels of training have been completed, a mediator may be certified in child protection mediation and later continue training through CMEs. Mediators trained and certified in child protection mediation can offer specialized knowledge about legal concerns, enabling them to better inform participants and understand the emotional dynamics of the family, all of which will enable them to provide a better forum for families and meet the best interest of the child.

¹⁶⁸ See generally *id.* (suggesting that mediator training also include “sensitivity awareness”).

¹⁶⁹ See IRVING, *supra* note 72, at 382 (suggesting potential mediated issues that might arise in child protection cases); Lande, *supra* note 32 (discussing issues that participants may discuss in child protection mediation).

¹⁷⁰ For a discussion on the importance of including the child in child protection mediation cases, see *supra* Part IV.A.

¹⁷¹ See BELL, *supra* note 142, at 93 (reporting views of professionals in the child care and welfare fields suggesting skills training as a necessary component to mediator training which would also include: “assertiveness, being open, help in report writing, and presentation of self and material”).

C. Confidentiality in the Mediation Process

Confidentiality is an important aspect of any successful mediation.¹⁷² In a confidential mediation process, frank discussion of a parent's problems, such as drug or alcohol abuse, can occur without the risk of these facts being used against the parent in court.¹⁷³ In fact, "[t]he guarantee of confidentiality is the linchpin of the program . . ."¹⁷⁴ Confidentiality is crucial to the process; however, under the current Uniform Mediation Act (UMA), the UMA drafters left to the states the option to address the issue of confidentiality in child protection mediation independently.¹⁷⁵ Section 6(a)(7) of the UMA provides that there is no privilege for "a mediation communication that is . . . sought or offered to prove or disprove abuse, neglect or abandonment, or exploitation in a proceeding in which a child or

¹⁷² "[P]arties to the mediation must feel free to speak openly about all their needs, interests, and feelings. They must also be certain that what they say at . . . mediation will be treated as confidential . . . and will not be used as evidence in any later . . . judicial proceeding." MICHAEL NOONE, *MEDIATION*, 7-8 (Julie Macfarlane ed., 1996). Confidentiality is especially helpful in relationships where parties would otherwise not disclose information and where furthering this relationship is important to society. Dispute settlement is beneficial to society and because participants would not be frank with mediators without confidentiality, "confidentiality is thought by many to be critical to mediation." CARRIE J. MENKEL-MEADOW ET AL., *DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL* 420 (2005).

¹⁷³ See Sander, *supra* note 31. Darron Bowden, Chief of the Civil Division in the Cook County Public Defender's Office has found confidentiality to be imperative to the success of child protection mediation programs. *Id.* See *supra* note 97 for a discussion of successes of Cook County's child protection mediation program.

¹⁷⁴ See Sander, *supra* note 31 (citing Darron Bowden, Chief of the Civil Division in Cook County Public Defender's Office).

¹⁷⁵ Gregory Firestone, *An Analysis of Principled Advocacy in the Development of the Uniform Mediation Act*, 22 N. Ill. U. L. REV. 265, 275 (2002) [hereinafter Firestone 2]. If optional language is not adopted by the states to protect statements made during the mediation, it is likely that parties will be unwilling to discuss these allegations. Further, giving the states the option to choose whether or not to adopt the confidentiality protection erodes the uniformity of the Act in regards to child protection cases. *Id.*; see also MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE (2000). The Special Policy Considerations for State Regulation of Family Mediators and Court Affiliated Programs section of the MODEL STANDARDS OF PRACTICE FOR FAMILY AND DIVORCE Appendix states: "Individual states or local courts should set standards and qualifications for family mediators including procedures for evaluations. . . . In developing these standards and qualifications, regulators should consult with appropriate professional groups. . . ." *Id.*

adult protective services agency is a party.”¹⁷⁶ The UMA provides only optional bracketed language extending confidentiality to instances in which a case is referred to a court or where a public agency participates.¹⁷⁷

There are two competing views regarding the role of confidentiality in child protection mediation.¹⁷⁸ One view holds that in order to meet the best interests of the child and encourage offender accountability, any information disclosed in mediation should be available to those who place the child in order to ensure that there is no further harm and that the offender is subject to appropriate sanctions.¹⁷⁹ The other view holds that unless confidentiality can be guaranteed in the mediation process, participants will be less likely to be honest and open, real issues may be stifled, and the goals and potential benefits of mediation will be lost.¹⁸⁰

¹⁷⁶ UNIF. MEDIATION ACT § 6(a)(7) (amended 2003), 7A U.L.A. 140 (Supp. 2006). It is interesting to note that the comments following this section in the UMA state that the exception to privilege does not apply in private cases. As a result, if a husband admits to abusing a child during mediation between husband and wife seeking a divorce, the husband’s admission would be privileged in the divorce proceeding, but not if the action had been brought by a public agency in order to protect the child. UNIF. MEDIATION ACT § 6 cmt. 8, 7A U.L.A. 144 (Supp. 2006).

¹⁷⁷ Currently, § 6(a)(7) does offer two options providing limitations to this exception to privilege that states may elect to choose. The final draft of the UMA states:

There is no privilege under Section 4 for a mediation communication that is: . . . sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation in a proceeding in which a child or adult protective services agency is a party, unless the [Alternative A: [State to insert, for example, child or adult protection] case is referred by a court to mediation and a public agency participates.] [Alternative B: public agency participates in the [State to insert, for example, child or adult protection] mediation]. . . .

UNIF. MEDIATION ACT § 6(a)(7). If a state fails to adopt one of the bracketed alternatives, confidentiality will not be guaranteed and parents will be less likely to discuss allegations. *See*, Firestone 2, *supra* note 175, at 275.

¹⁷⁸ TAYLOR, *supra* note 73, at 366 (debating the issue of “greater good: preserving the integrity of the mediation process or allowing subsequent disclosure?”).

¹⁷⁹ *Id.*

¹⁸⁰ *See* Sander, *supra* note 31 (stating that confidentiality is the “linchpin” of mediation; only when the mediation is confidential can real issues such as parental drug abuse be openly discussed without the fear that statements will be used later); TAYLOR, *supra* note 73, at 366. Confidentiality promotes honesty in mediation, allowing the real capacities and issues to come forward. Fundamentally, mediation requires the “safe harbor of complete privileged communication by the mediator and the parties in order to maintain its integrity.” *Id.*

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This latter view best supports the goals of mediation. In order to elicit active participation by the parties and ultimately establish an agreement, mediation must create an open forum in which honesty is encouraged—not discouraged—by the threat of prosecution.¹⁸¹ This is especially important in child protection mediation cases, where the best interest of the child cannot accurately be met unless participating parties, particularly parents, are frank and candid about the abuse or neglect and any other issues which may be involved.¹⁸²

In responding to critics' concerns about child safety,¹⁸³ and keeping in mind the best interest of the child, confidentiality rules should provide an exception for those cases in which failure to disclose information would result in a clear and substantial risk of imminent harm or danger to the child.¹⁸⁴ Critics also argue that confidentiality rules may lower offender accountability.¹⁸⁵ This contention is not necessarily true. Based on the open and honest statements made during the mediation, parents, caseworkers, and children, if they are involved, may decide on an agreement requiring parents to seek help or counseling and make custody contingent upon resolution of the issues.¹⁸⁶

¹⁸¹ See Weinstein, *supra* note 94, at 171 (stating that confidentiality rules in child protection cases would give way to the needs of the family involved).

¹⁸² See Sander, *supra* note 31 (discussing the use of confidentiality in the child protection mediation program in Cook County, IL).

[I]n mediation, where frank discussions of drug abuse can occur without the risk of the fact being used in court against the parent, a parent's admission of substance abuse and a desire to change can be viewed as a strength . . . If someone said something in confidence, and it was used against them, we would have to seriously think about whether we could continue . . . the program.

Id.

¹⁸³ See TAYLOR, *supra* note 73, at 366 (describing the argument that offenders should be held accountable, and failure to make information available may result in future harm to the child).

¹⁸⁴ See William Wesley Patton, *Child Abuse: The Irreconcilable Differences Between Criminal Prosecution and Informal Dependency Court Mediation*, 31 U. LOUISVILLE J. FAM. L. 37, 55 (suggesting that combining an immunity provision with an exception for reporting incidences that may result in serious imminent harm to child will create a statute that encourages parents to participate while still protecting the child).

¹⁸⁵ TAYLOR, *supra* note 73, at 366.

¹⁸⁶ See Edwards, *supra* note 8, at 62 (providing a description of a successful child protection mediation program in Santa Clara County, CA which practices confidential mediation. Except for new allegations of child abuse or neglect, all discussions in the mediation are confidential and inadmissible); Sander, *supra* note 31 (discussing the

Current standards under the UMA do not require confidentiality.¹⁸⁷ Uniform and detailed guidelines are necessary regarding the confidentiality of child protection mediation cases.¹⁸⁸ Until then, mediators must attempt to balance the desire for open and candid truthfulness with offender accountability.¹⁸⁹ Further, guidelines can provide an understanding of the confidentiality rules, which mediators in turn can clearly and accurately explain to participants.¹⁹⁰ In preparing uniform confidentiality rules, drafters should require that states impose confidentiality requirements in child protection mediation cases. This is the most effective way of guaranteeing that all parties will be honest and open. In weighing the ability to reach an agreement in the best interest of the child, based on full disclosure, against the possibility that communications may have proven fruitful for further litigation, the states must choose to support the best interest of the child and require confidentiality in all child protection mediations.¹⁹¹

importance of confidentiality in the child protection mediation program in Cook County, IL).

¹⁸⁷ Under the UMA, each state must adopt the UMA into statute, which leaves the national situation ambiguous. In order to offer guidance to drafters of the UMA, the Association for Conflict Resolution drafted a set of eleven principles for developing uniform mediation laws.

Principles 9 and 11 state that any such legislation or revision should: [9] Adequately address how mediators, parties and representatives are to comply, if at all, with mandatory reporting requirements, that may be required by law or professional ethical standards . . . [11] Take into consideration the special concerns raised when the threat of violence is present.

TAYLOR, *supra* note 73, at 368.

¹⁸⁸ See *id.* “[A] clarification in the final version of the UMA may help prevent problems for participants and ethical dilemmas for mediators in these situations . . .” *Id.*

¹⁸⁹ See *id.* at 366.

¹⁹⁰ Since one potential purpose of mediation is to exchange information to prepare for hearings—even if information may not be directly used—statements and communications made during mediation may impact the attitudes, behaviors, and recommendations of the parties. Confidentiality rules are intricate and difficult for most people, especially less educated or low functioning members of a family who may be involved in the child protection mediation. Thus, it is extremely important that mediators have enough guidance so that they in turn may be able to better inform and help participants. See Lande, *supra* note 32.

¹⁹¹ See Firestone 2, *supra* note 175, at 275. (stating that without confidentiality of child protection mediations “a helpful form of ADR” will be inhibited). In order for parents to engage in a full discussion, states must recognize the importance of confidentiality and protect mediation communications. *Id.*

V. CONCLUSION

During the investigation of the caged children in rural Ohio, the adoptive foster parents felt as though they were acting in the children's best interest—protecting the children from themselves and each other.¹⁹² Child protection mediation, as opposed to traditional litigation, can provide a supportive forum for families, like this one from Ohio, to discuss and reach resolutions to child abuse and neglect cases.¹⁹³ By involving the child in the mediation

¹⁹² Chris Browne, *Police find 8 Ohio Kids Locked in Cages*, CNN, Sept. 13, 2005, www.cnn.com/2005/US/12.caged.children. On March 20, 2006, a juvenile judge stripped the foster parents of their custody of all eleven children. Associate Press, *Ohio Couple Lose Custody of adopted caged kids*, USA TODAY, March 20, 2006, www.usatoday.com/news/nation/2006-03-20-caged-children_x.htm?csp=34. The foster parents were also indicted along with their social worker in February of 2006. The foster parents were charged with sixteen felony counts of child endangering and eight misdemeanor counts of child endangering. The foster parents continue to deny mistreating their children and insist that they were only trying to protect the children. Carl Matzelle & Molly Kavanaugh, *Parents Indicted in Cages' Case*, February 15, 2006, <http://cleve.live.advance.net/printer/printer.ssf?/base/iscrl/1140008209291e880.xml&coll=2>.

¹⁹³ While it is beyond the scope of the Note, it is important to recognize that an issue of capacity may arise in regards to the participation of the children in the Huron County, Ohio case. Because the party's active participation and thorough understanding is critical in the mediation process, mediators need to be concerned when it appears as though a party lacks the capacity to be fully involved in the process. Judy Cohen, *Fulfilling Your Obligations on Mediation Capacity*, July 2003, www.mediate.com/ADAMediation/editorial5.cfm. Under The Americans with Disabilities Act Mediation Guidelines, a surrogate may participate in the mediation to represent the party lacking capacity. The Guidelines further note that legal incapacity is not determinative of a person's capacity for mediation. *ADA Mediation Guidelines*, CARDOZO ONLINE J. CONFLICT RESOL. 4-5 (2000), available at <http://cojcr.org/ada.html>. In regards to the children in the Huron County, Ohio case, a guardian *ad litem* may be appropriate to fill the role of surrogate if the mediator finds that one or more of the children lack the necessary capacity. For a further explanation of the role of a guardian *ad litem* see *supra* note 38 and accompanying text. For a more detailed discussion on capacity in mediation, see Kathleen Blank, *It is Not a Disability Issue*, July 2003, www.mediate.com/articles/blankK1.cfm (discussing the danger of identifying the capacity to mediate as only a disability issue); Tim Hedeem, *Ensuring Self-Determination through Mediation Readiness: Ethical Considerations*, July 2003, www.mediate.com/articles/hedeemT1.cfm (examining implications of self-determination in the mediation process and mediator's role to determine the capacity of the parties); Erica Wood, *Addressing Capacity: What is the Role of a Mediator?*, July 2003, www.mediate.com/articles/woodE1.cfm (discussing the "sliding scale of capacity" and the mediator's role in accommodating an impaired party so as to allow their participation).

process, the parent-child relationship can be fostered, and children will be able to have their needs heard, thus enabling the true best interest of the child to be met. Further, developing training and certification guidelines for mediators can further enhance the mediation process. Mediators trained specifically in the legal issues involved in child protection mediation, as well the behavioral sciences, are better equipped to understand and work with the dynamics of each family. Finally, requiring confidentiality ensures that parties to the mediation will be free to participate in an open and honest manner. Child abuse and neglect are issues this country cannot afford to ignore. Through this suggested development, child protection mediation can be successful in working with families to protect our children and serve their best interest.